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9

10   UNITED STATES DISTRICT COURT

11   CENTRAL DISTRICT OF CALIFORNIA

12   WESTERN DIVISION

13

PERFECT 10, INC., a California Corporation ,	Case No.: 11-cv-07098-ABC (SHx)
Plaintiff,	**DECLARATION OF PHILIP MOLTER IN OPPOSITION TO MOTION FOR PARTIAL SUMMARY JUDGMENT**
v.	
GIGANEWS, INC., a Texas Corporation; LIVEWIRE SERVICES, INC., a Nevada Corporation; and Does 1 through 100, inclusive,	
Defendant.	
GIGANEWS, INC., a Texas Corporation; LIVEWIRE SERVICES, INC., a Nevada Corporation,	
Counterclaimants,	
v.	
PERFECT 10, INC., a California Corporation,	
Counterdefendant.	

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MOLTER DECLARATION ISO
OPPOSITION TO MOTION FOR PARTIAL   Case No.: 11-cv-07098-ABC (SHx)
SUMMARY JUDGMENT

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1   I, Philip Molter, declare as follows:

BACKGROUND

2

3   1.   I am Chief Technology Officer ("CTO") of Giganews, Inc.

4 ("Giganews").   I have been the CTO of Giganews since 2008. From 2000 to 2008,

5 I worked as a programmer for Giganews and related companies.

6   2.   As CTO, my duties include developing technical solutions necessary

7 to provide our Usenet service and managing staff and resources needed to

8 implement these solutions.

9   3.   I am familiar with the business and technical operations of Giganews

10 and with the general operation and structure of the Usenet. In my position as CTO,

11 I oversee the managers of our network engineering team, our server operations

12 team, and our technical and support department. I am responsible for selecting the

13 hardware necessary to run the Giganews service as well as the facilities necessary

14 to house that hardware. I am knowledgeable about the operation of its servers and

15 services.

GIGANEWS'S OPERATIONS

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17   4.   Giganews provides Usenet access services to its customers. Giganews

18 is one among several hundred Usenet access service providers around the world.

19   5.   Usenet is a messaging system that operates through the Internet.

20 Usenet messages are disseminated around the world to Usenet servers, including to

21 Giganews's servers, through an automated process. After an individual user with

22 access to a Usenet server posts a message to a Usenet newsgroup, the message is

23 automatically forwarded to adjacent Usenet servers, which then automatically

24 forwards the message to adjacent Usenet servers, etc.

25   6.   Usenet is a distributed network; no single company or organization

26 controls, operates, or maintains Usenet. Giganews's Usenet servers adhere to the

27 industry-standard network news transfer protocol ("NNTP"), which was established

28 in 1986. Giganews maintains Usenet servers at various locations around the world,

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including in downtown Los Angeles, California. Pursuant to NNTP standards, all messages on Giganews' Usenet servers reside as ASCII text files. No message resides on Giganews's Usenet servers as native image files, music files, movie files, or executable files. In addition, Giganews does not store searchable indices of message bodies, or attachments. There is no "image identifier" associated with messages containing images, and no mechanism by which Giganews can search for particular images.

7.   Giganews provides Usenet access service to its subscribers based on fixed-fee plans. Giganews does not charge its subscribers any fees for particular newsgroups, messages, or types of messages. Giganews's subscribers can access Giganews's Usenet servers to post messages to Usenet newsgroups as well as retrieve messages posted on Usenet by other users. Subscribers must use a third-party newsgroup reader (or newsreader, for short) in order to post messages or retrieve messages from Usenet. A Usenet newsgroup reader is analogous to a browser for the World Wide Web such as Mozilla's Firefox or Microsoft's Internet Explorer. Many third-party newsreaders exist, and some programs, such as Microsoft's Outlook Express, have built-in newsgroup-reader functionality.

8.   Giganews does not conduct any editorial pre-screening or review of which newsgroups appear on its Usenet servers. Giganews's Usenet servers accept Usenet newsgroups that meet Giganews's technical requirements, such as newsgroups named in the non-profit Internet Systems Consortium's ("ISC") list of active newsgroups. Giganews's users may also request additional existing newsgroups, which Giganews will provide if such newsgroups are listed as an active newsgroup by the ISC or available already on other Usenet servers which send Giganews Usenet messages.

9.   Giganews publishes its policies and other information but does not provide Usenet access on its website, www.giganews.com. Giganews maintains its website for general information, sign-up, account management, FAQ and help, and

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1   DMCA-related information. This website, however, is not part of Usenet.

2   Giganews's web server contains no Usenet messages or newsgroups. A Giganews

3   subscriber cannot post a message to Usenet or retrieve a message from Usenet from

4   Giganews's web server. A Giganews subscriber must connect to Giganews's

5   Usenet servers to access Usenet. Therefore, searches that could be conducted on

6   Giganews's website, using indexes identifying content location, would have no

7   effect in locating content on the Usenet.

8   10.   There are billions of Usenet messages in the world. Due to the large

9   number of messages, Giganews's Usenet servers index messages only by Message-

10 ID and the message's newsgroup article number(s) (a user may associate a single

11 message with more than one newsgroup).

12   11.   Due to space constraints, Usenet server operators generally set their

13 servers to discard older messages when the server runs out of hard disk space, and

14 this is true for Giganews as well. Currently, Giganews's Usenet servers have

15 enough space to retain messages at least as old as 1934 days. This discarding

16 process is simply a part of the Usenet's structure.

17   12.   I understand that Perfect 10 has argued that Giganews stores user-

18 uploaded content for as long as it wishes, regardless of the original uploader's

19 wishes. That is not true. While I have not encountered a situation in which a poster

20 requested removal of his or her own posted message from the Usenet, if the original

21 uploader of a message were to provide Giganews with a request for removal and a

22 Message-ID, and Giganews can verify that person's identity, Giganews would

23 respect that person's wishes. Of course, if this person submitted a request in the

24 format of a DMCA notice, Giganews would process the request likely without even

25 knowing the relationship between the original uploader and the requester.

26 **NECESSITY OF MESSAGE-IDS FOR MESSAGE IDENTIFICATION**

27   13.   Every Usenet message includes information about the message in

28 "header" fields within the message. Every message contains a Message-ID header

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that uniquely identifies that message and distinguishes it from all other messages in Usenet. For Giganews, and the Usenet in general, the Message-ID header of every message is the standard means to identify a Usenet message. Any other form of identification of a message would involve additional investigation, but ultimately would still require identification of the Message-ID of the specific message in order for Giganews to locate the message on its Usenet servers. Because of the need for Message-IDs to locate particular messages, Giganews informs users on its website that all notices requesting removal of infringing content must include a Message-ID.

14.   A copyright holder should not have difficulty finding the pertinent Message-ID associated with any infringing posted content as that Message-ID is displayed in the header of the message itself. Thus, if the copyright holder has identified a message containing infringing material, the holder will necessarily see the Message-ID identifying that message. While one can readily find the Message-ID from viewing the message itself, however, one cannot find the Message-ID from a description of the content of the message for the reasons described in this declaration–Giganews does not have indexing or searching functionality that would permit one to search for and find a particular image.

15.   Perfect 10's Statement of Undisputed Facts makes many incorrect statements regarding Message-IDs. Message-IDs can be used to find and download specific Usenet messages. A copyright holder can view the resulting downloaded message to determine if it includes an encoded image, decode the image, view the image, and then verify whether the image appears to correlate with any copyrighted image identified by the copyright holder.

16.   Sometimes, even after a message has been removed, it will still appear in non-server indices. Therefore it may still be listed in response to a search. This is analogous to a "dead link" on the Internet – if one actually attempts to download a message using the Message-ID, the Usenet server will return a non-successful

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1   response code if the message is unavailable.

2   17.   Included in the metadata (headers) of the Usenet message is a Date

3   header field which by convention records the date and time the message was

4   generated and posted to Usenet.

5   18.   To facilitate efficient DMCA processing, Giganews assigns each

6   Usenet message posted by a Giganews accountholder through its Usenet servers an

7   "X-Trace header" which encrypts the information about which Giganews account

8   posted the message. If a copyright holder provides Giganews the Message-ID for

9   an infringing message, Giganews can decrypt the information in the X-Trace header

10   for that message and then provide the information for the posting account to the

11   copyright holder when requested through a proper court order.

12   19.   Perfect 10's Statement of Undisputed Facts states: "A copyright

13   holder cannot use a Message-ID to determine whether the allegedly infringed

14   images were part of a larger related group." This is wrong. The only "large related

15   group" concept on Usenet is that of the newsgroup. Message-IDs can be used to

16   find and download specific Usenet messages. Included in the metadata (headers) of

17   the Usenet message is a Newsgroups header field, which records to which group (or

18   groups) a message was posted. Using the Newsgroups header field of the

19   downloaded message, a copyright holder can request a list of all messages

20   associated with the listed newsgroups to review for other allegedly infringing

21   images.

22   **GIGANEWS'S MESSAGE REMOVAL PRACTICES**

23   20.   Giganews's Usenet servers currently contain approximately 35-40

24   billion messages. In response to DMCA-compliant notices from copyright holders,

25   Giganews deletes millions of Usenet messages. If the notice contains all that

26   Section 512(c)(3) requires, Giganews expeditiously processes the notice by

27   inputting the Message-IDs the notice lists into a program that (1) removes the

28   message associated with each Message-ID from Giganews's Usenet server, and (2)

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1   adds that Message-ID to a search list so that Giganews can periodically search its

2   servers and automatically remove any listed Message-IDs should they reappear.

3   Giganews then informs the sender it has taken steps to remove the messages.

4   21.   Given the volume of material uploaded by users to Giganews's

5   servers, the deleted messages represent a very small portion of the whole.

6   Approximately 98% of the Usenet messages posted to Giganews's servers have

7   never been identified as infringing or subject to a removal request.

8   22.   As an example, for the twelve month period from November 6, 2012

9   to November 6, 2013, Defendants received approximately 204,470 takedown

10   notices that included a total of approximately 690,865,100 Message-IDs.

11   Excluding those that were duplicates or messages not present on Giganews' servers,

12   there remained approximately 531,512,900 Message-IDs specified by those notices.

13   Giganews removed all of those approximately 531,512,900 messages.

14   23.   If Giganews had not received Message-IDs in connection with these

15   requests, and had to try to find these messages through manual searches using

16   newsreaders, it would have required many thousands of hours of work and

17   Giganews likely still could not have found them all. Even if Giganews were

18   informed that an allegedly infringing message was posted to a particular

19   newsgroup, the identification process would be extremely time-consuming.

20   Giganews would have to download and manually review the contents of each

21   message and compare against the copyright holder's work. If the body of the

22   message was encoded, Giganews would need to use third-party software to decode

23   the contents before review. Many newsgroups have millions of articles.

24   24.   These notices came from a wide range of copyright claimants,

25   including Warner Bros., HBO, Lionsgate Films, the Entertainment Software

26   Association, the Recording Industry Association of America ("RIAA"), Microsoft,

27   and NBC Universal. These entities sometimes send thousands of notices

28   concerning millions of Message-IDs. For example, in the past twelve months,

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1   RIAA has submitted approximately over nine thousand notices identifying over

2   twelve million Message-IDs on behalf of its members, all of which Giganews has

3   removed or were already not on Giganews's servers.

4   25.   A copyright owner can submit a single notice to cover thousands of

5   messages. For example, NBC Universal submitted approximately 23 notices

6   identifying 350,000 Message-IDs and resulting in the removal of the associated

7   messages.

8   26.   Giganews handles notices expeditiously. The processing times vary

9   by complexity of notices and volume of notices at a particular time, but Giganews

10 typically processes a well-formed DMCA notice and removes the messages it

11 specified by Message-ID within 48 hours.

GIGANEWS'S REPEAT INFRINGER TERMINATION POLICY

13   27.   Giganews has a two-strike repeat infringer termination policy. If it is

14 the first time Giganews has received a notification that the accountholder had

15 posted allegedly infringing material, Giganews automatically suspends posting

16 access for that account and sends the accountholder a notification of the suspension.

17 This notification warns the accountholder that Giganews's terms of service prohibit

18 use of its systems to commit copyright infringement, and that this notification is his

19 or her one and only warning. Exhibit A is a sample notice that Giganews has on its

20 website at http://www.giganews.com/legal/dmca_onetimenotice.html.

21   28.   In order for an accountholder to regain posting access, he must affirm

22 in response to the notification that he or she will abide by Giganews's terms of

23 service and not infringe any copyrights. If Giganews receives another notice of

24 claimed infringement identifying by Message-ID a message posted by the same

25 account after this suspension has been lifted, Giganews will permanently terminate

26 that account's posting access. Since August 2008, Giganews has permanently

27 terminated posting access for 46 accounts for DMCA-related reasons. Before that

28 date, Giganews did not track whether termination reasons were specifically DMCA-

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related but did have a policy for terminating accounts for violations of its terms of
service, which prohibits, among other things, copyright infringement.

29.   To determine who is an alleged infringer, Giganews has a method for
determining which account an allegedly infringing message came from. Users
frequently will not use their real names or email addresses in the text of their
messages, and so Giganews sought a means of identifying posters without having to
rely on information in the message itself. Giganews did so by inserting an
encrypted X-Trace field into the message header of every Usenet message posted to
Giganews's servers using a Giganews account. This X-Trace header field is an
encrypted binary tag that, once decrypted, allows Giganews to retrieve the
following information about the message:

- Giganews username for the posting account

- IP address from which post was made

- date the account posted the message to Giganews's Usenet server

- the Message-ID of the post

30.   When a copyright holder notifies Giganews that a particular message
infringes the copyright holder's rights by providing a DMCA notice that includes a
Message-ID for that message, Giganews uses that Message-ID to retrieve the full
message header, including the X-Trace field. By decrypting the contents of that
field, Giganews can determine if a Giganews account originally posted the
message, and if so, which account.

31.   If the message did not originate with a Giganews account, either the X-
Trace field would not exist or could not be decrypted by Giganews. Therefore, as
to messages posted by Usenet users that are not Giganews subscribers, Giganews
can remove the message if the Message-ID is provided, but there is no means by
which reliably to identify the poster. If the message did originate with a Giganews
account, Giganews will forward the notice to the accountholder and, if the account
is still active, apply the process that I described above.

PERFECT 10'S INACCURATE STATEMENTS REGARDING PSEUDONYMS

32.   I reviewed Perfect 10's Statement of Undisputed Facts and Conclusions of Law (Dkt No. 142-1), and it contains many factual inaccuracies. I have also reviewed the Zada Declaration (Dkt. No. 142-3) and its exhibits, paying particular attention to Exhibits 2, 4-7, 9-13, and 15.

33.   I have reviewed Perfect 10's statements regarding pseudonyms found in the "From:" field of Usenet message headers. Perfect 10 mistakenly bases its statements on an incorrect assumption that each pseudonym uniquely identifies one accountholder. This assumption is wrong because the "From:" field of a Usenet header is an unmoderated field. A user can change the information in this field every time he or she makes a post, and multiple users can put the same information into this field. It thus cannot uniquely identify the account or subscriber that originally posted the message and cannot be used for authentication of identity.

34.   Given its lack of utility for purposes of identifying posters, Giganews does not index the "From:" field of Usenet message headers. Giganews does not track or identify messages based on the pseudonym with which Usenet messages are posted. Giganews thus cannot determine how many messages associated with a particular pseudonym in the "From:" field have been posted to the Usenet. In addition, Giganews's servers have no way to identify all messages with particular information in the "From:" field through a search for that information.

35.   Giganews also does not track by account all of the messages each Giganews account posts in its lifetime. Giganews can use a Message-ID to find a particular message and use that message's header to determine the account that posted it (if it was a Giganews account), and Giganews can then block that account from posting again. But Giganews has no way to determine all of the messages an account previously posted by using the Subscriber ID, and therefore it cannot remove all past messages posted by that user. Nor has it been Giganews's

1 understanding that a DMCA-compliant repeat infringer termination policy requires

2 removal of past messages where those messages have not been specifically

3 identified, by Message-ID, as infringing.

4   36.   Giganews further cannot determine whether the messages associated

5 with a pseudonym contain encoded images because Giganews does not review or

6 track the contents of messages.

REVIEW OF SPECIFIC PSEUDONYMS

8   37.   I have reviewed Perfect 10's Statement of Undisputed Facts and the

9 Zada Declaration. These documents make incorrect statements and draw inaccurate

10 conclusions regarding specific pseudonyms. In particular, these documents appear

11 to depend on information in the chart in Exhibit 15 of the Zada Declaration ("Zada

12 Exhibit 15"), which I have also reviewed. I address these on a pseudonym by

13 pseudonym basis.

14   *MrD@the.net*

15   38.   Relying on the information in the chart in Zada Exhibit 15, Giganews

16 has located 46 notices from Perfect 10 containing Message-IDs which identify

17 messages posted with the pseudonym MrD@the.net in the header. In addition,

18 Giganews has received 1 other notice from Perfect 10 that depicts search results for

19 messages posted with the pseudonym MrD@the.net but which contained no

20 Message-IDs for any message posted with the pseudonym MrD@the.net.

21   39.   As of October 14, 2013, at least 230 messages associated with the

22 Message-IDs Perfect 10 has provided to Giganews included the MrD@the.net

23 pseudonym in message headers, and 230 of them were posted by a single account.

24 Giganews removed all messages for which Perfect 10 has provided Message-IDs

25 that included the pseudonym MrD@the.net in the message header. This account

26 has not submitted any counter-notifications to Giganews, but the accountholder

27 canceled the account on March 28, 2010, and Giganews does not know whether the

28 accountholder received the notices Giganews forwarded. As the account has long

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1   been terminated, there was no further action Giganews could take to terminate this

2   account's access and ability to post.

3   *BillC@myplace.com*

4   40.   Relying on the information in the chart in Zada Exhibit 15, Giganews

5   has located 31 notices from Perfect 10 containing Message-IDs which identify

6   messages posted with the pseudonym BillC@myplace.com in the header.

7   41.   As of October 14, 2013, at least 116 messages associated with the

8   Message-IDs Perfect 10 has provided to Giganews included the

9   BillC@myplace.com pseudonym in message headers, and 116 of them were posted

10   by a single account, all before August 25, 2011. Giganews removed all messages

11   for which Perfect 10 has provided Message-IDs that included the pseudonym

12   BillC@myplace.com in the message header. This account has not submitted any

13   counter-notifications to Giganews.

14   42.   In particular Perfect 10 sent one notice to dmca2008@giganews.com

15   on each of May 19, 2013, and May 24, 2013, which provided Message-IDs

16   identifying messages from January 2009 containing images that allegedly infringed

17   Perfect 10's copyrights that had been posted to Usenet using Giganews servers by

18   an account that included the pseudonym BillC@myplace.com in message headers.

19   Giganews removed these messages. This account was blocked from posting to

20   Giganews Usenet servers on August 25, 2011 at 18:59:40 UTC in response to a

21   takedown request. The account was allowed to resume posting to Giganews Usenet

22   servers on August 25, 2011, at 21:15:56 UTC after the accountholder affirmed in

23   response to a first warning that the account would not be used to post unauthorized

24   copies of copyrighted materials. As of October 16, 2013, neither Perfect 10 nor any

25   other copyright holder has identified by Message-IDs any message posted by this

26   accountholder after August 25, 2011 as infringing its rights. As there is no

27   indication that this user ever posted infringing material again after the initial

28   warning in 2011, this account has not faced further discipline and therefore is still

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1   allowed to post new messages to Usenet through Giganews Usenet servers.

2   *Thumper@rabbit.com*

3   43.   Relying on the information in the chart in Zada Exhibit 15, Giganews

4   has located 21 notices from Perfect 10 containing Message-IDs which identify

5   messages posted with the pseudonym Thumper@rabbit.com in the header.

6   44.   As of October 14, 2013, at least 100 messages associated with the

7   Message-IDs Perfect 10 has provided to Giganews included the

8   Thumper@rabbit.com pseudonym in message headers, and 100 of them were

9   posted by a single account. Giganews removed all messages for which Perfect 10

10 has provided Message-IDs, including those that included the pseudonym

11 Thumper@rabbit.com in the message header. This account has not submitted any

12 counter-notifications to Giganews. This account was blocked from posting to

13 Giganews Usenet servers on August 25, 2011 at 19:02:29 UTC. The account was

14 allowed to resume posting to Giganews Usenet servers on August 29, 2011, at

15 22:23:32 UTC after the accountholder affirmed that the account would not be used

16 post unauthorized copies of copyrighted materials. As of October 16, 2013, neither

17 Perfect 10 nor any other copyright holder has identified by Message-IDs any

18 message posted by this accountholder after August 25, 2011 as infringing its rights.

19 As there is no indication that this user ever posted infringing material again after

20 the initial warning in 2011, this account has not faced further discipline and

21 therefore is still allowed to post new messages to Usenet through Giganews Usenet

22 servers.

23   *Karolus@Irgendwo.XX*

24   45.   On April 26, 2013, Perfect 10 sent two notices and on August 21,

25 2013, Giganews received one notice from Perfect 10 dated August 19 which

26 provided Message-IDs identifying messages from 2009 and 2011 containing

27 material that allegedly infringed Perfect 10's copyrights that were posted to Usenet

28 using Giganews servers by a single account that included the pseudonym

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1   Karolus@Irgendwo.XX in message headers. Giganews removed all messages for

2   which Perfect 10 has provided Message-IDs in these notices. This account has not

3   submitted any counter-notifications to Giganews. This account was blocked from

4   posting to Giganews Usenet servers on September 14, 2011 at 15:06:48 UTC. The

5   account was allowed to resume posting to Giganews Usenet servers on September

6   14, 2011, at 16:33:07 UTC after the accountholder affirmed that the account would

7   not be used post unauthorized copies of copyrighted materials. As of August 27,

8   2013, neither Perfect 10 nor any other copyright holder has identified by Message-

9   IDs any message posted by this accountholder after September 14, 2011 as

10   infringing its rights. As there is no indication that this user ever posted infringing

11   material again after the initial warning in 2011, this account has not faced further

12   discipline and therefore is still allowed to post new messages to Usenet through

13   Giganews Usenet servers.

14   *Shogun3@shogunate.com.jp*

15   46.   On each of May 19, 2013, and May 24, 2013, Giganews received at

16   the dmca2008@giganews.com email address one notice from Perfect 10 which

17   provided Message-IDs identifying messages dating from 2012 containing images

18   that allegedly infringed Perfect 10's copyrights that had been posted to Usenet. The

19   messages had been posted to Giganews servers by two different accounts that

20   included the pseudonym shogun3@shogunate.com.jp, neither of which was a

21   Giganews account, as determined by checking the X-Trace field information.

22   Giganews has not received any counter-notifications concerning these messages

23   and consequently Giganews has not passed on any counter-notifications to Perfect

24   10. Of the Message-IDs provided in the notices on May 19, 2013, and May 24,

25   2013, that concerned messages that included the pseudonym

26   shogun3@shogunate.com.jp, one message was posted through an account that was

27   terminated by a reseller for non-payment on August 5, 2012. The other three were

28   not originally posted to Giganews servers and were not posted using Giganews

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accounts; Giganews thus cannot determine the identity of the poster and has no means of terminating his or her ability to upload future messages to Giganews Usenet servers. Giganews removed all messages for which Perfect 10 has provided Message-IDs in these notices.

47.   The Message-ID depicted on Page 17 of Exhibit 16 does not identify a message that was posted by the same account that posted either of the messages identified by Message-ID on May 19, 2013, and May 24, 2013, that allegedly concerned messages that included the pseudonym shogun3@shogunate.com.jp.

harpo@marx-brothers.org

48.   On each of August 23, 2013, and September 29, 2013, Giganews received at its dmca2008@giganews.com email address one notice from Perfect 10 which provided Message-IDs identifying messages from February 2013 that allegedly infringed Perfect 10's copyrights that had been posted to Usenet using Giganews servers by an account that included the pseudonym harpo@marx-brothers.org. Giganews removed all messages for which Perfect 10 has provided Message-IDs in these notices. This account has not submitted any counter-notifications to Giganews. This account was blocked from posting to Giganews Usenet servers on August 27, 2013, at 21:57:36 UTC. The account was allowed to resume posting to Giganews Usenet servers on August 30, 2013, at 21:52:36 UTC after the accountholder affirmed that the account would not be used post unauthorized copies of copyrighted materials. As of November 10, neither Perfect 10 nor any other copyright holder has identified by Message-IDs any message posted by this accountholder after August 27, 2013 as infringing its rights. As there is no indication that this user ever posted infringing material again after the initial warning in August 2013, this account has not faced further discipline and therefore is still allowed to post new messages to Usenet through Giganews Usenet servers.

49.   Perfect 10's Statement of Undisputed Facts states that "As of October 25, 2013, harpo@marxbrothers.org was still able to post material with X-

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14

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Complaints-To abuse@giganews.com." The "X-Complaints-To:" header field is unmoderated and anyone can put "abuse@giganews.com" or something else into this field when posting a message. That email address in the field does not automatically mean the user is actually a Giganews customer. In any event, if Perfect 10 submits a notice with a Message-ID that ties back to the same user showing continued uploads after the suspension of material that allegedly infringe Perfect 10's rights, Giganews would apply the policy as stated.

me@not.eu

50.   The chart in Zada Exhibit 15 lists this pseudonym as a "primary repeat infringer." Relying on the information in the chart in Zada Exhibit 15, in August and September 2013, Perfect 10 provided a total of 22 Message-IDs to Giganews that identified messages with the pseudonym me@not.eu in the message header. These 22 messages were posted with a single account, but that account had previously been terminated for nonpayment on June 28, 2009. Giganews removed all 22 messages associated with these Message-IDs. As the account has long been terminated, there was no further action Giganews could take to terminate this account's access and ability to post.

no@email.dk

51.   The chart in Zada Exhibit 15 lists this pseudonym as a "primary repeat infringer." Of the Message-IDs Perfect 10 has provided to Giganews, none identify a message with the pseudonym no@email.dk in the message header that was posted using a Giganews account. Giganews thus has no means by which to identify the user or terminate the user's ability to post to the Usenet. Giganews has removed all the messages for which Perfect 10 has provided Message-IDs.

sundog@ogworld.org

52.   The chart in Zada Exhibit 15 lists this pseudonym as a "primary repeat infringer." Of the Message-IDs Perfect 10 has provided to Giganews, none identify a message with the pseudonym sundog@ogworld.org in the message header that

1 was posted using a Giganews account. Giganews thus has no means by which to

2 identify the user or terminate the user's ability to post to the Usenet. Giganews has

3 removed all the messages for which Perfect 10 has provided Message-IDs.

4 *trin'@again*

5 53. The chart in Zada Exhibit 15 lists this pseudonym as a "primary repeat

6 infringer." Of the Message-IDs Perfect 10 has provided to Giganews, none identify

7 a message with the trin'@again in the message header that was posted using a

8 Giganews account. Giganews thus has no means by which to identify the user or

9 terminate the user's ability to post to the Usenet. Giganews has removed all the

10 messages for which Perfect 10 has provided Message-IDs.

11 **THE FIVE NOTICES IN ZADA DECLARATION EXHIBITS 9-13**

12 *Zada Exhibit 9(Notice 1):*

13 54. Exhibit 9/Notice 1 does not provide Giganews with information to

14 locate allegedly infringing material on its system without significant effort required

15 and ultimately uncertain results. All the notice states is that a search on a third-

16 party index using a third-party "News Rover" program will turn up search results

17 that reference messages that contain allegedly infringing material. In order to

18 locate the message on Giganews's servers, Giganews must retrieve the message

19 header associated with each search result and extract the Message-ID from each

20 message header.

21 55. After performing a search using a third-party program, Giganews

22 retrieved the message headers for each search result and extracted the Message-ID

23 from each message header. These search results may not be the same search results

24 Perfect 10 obtained; as material is uploaded to the Usenet and removed all the time,

25 search results performed at different times may yield different results. Based on the

26 results it received, Giganews then removed the messages associated with each of

27 these Message-IDs, a total of 107 messages. Giganews cannot independently

28 confirm that this was the allegedly infringing material because Sample Notice 1

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1   does not provide Message-ID identifiers for each message Perfect 10 expected to be

2   removed.

3   56.   Mr. Zada states in his declaration that Astraweb and Highwinds

4   Media–two other major Usenet operators–were able to remove infringing content

5   without being provided with Message-IDs. Giganews finds that 90 of the 107

6   allegedly infringing messages for which Giganews manually tracked down

7   Message-IDs are available from Astraweb. All of the 107 messages are still

8   available from Highwinds Media. Exhibit B shows the results I got.

9   *Zada Exhibit 10(Notice 2):*

10   57.   Exhibit 10/Notice 2 does not provide Giganews with information to

11   locate allegedly infringing material on its system without significant effort required

12   and ultimately uncertain results. Instead, all it states is that a search on a third-party

13   index using a third-party "News Rover" program will turn up search results that

14   reference messages that contain allegedly infringing material. In order to locate the

15   messages on Giganews's servers, Giganews must retrieve the message header

16   associated with each search result and extract the Message-ID from each message

17   header.

18   58.   After performing a search using a third-party program, Giganews

19   retrieved the message headers for each search result and extracted the Message-ID

20   from each message header. Giganews then removed the messages associated with

21   each of these Message-IDs, a total of 97 messages. Giganews cannot independently

22   confirm that this was the allegedly infringing material because Exhibit 10/Notice 2

23   does not provide Message-ID identifiers for each message it appeared to claim was

24   allegedly infringing.

25   59.   I checked Astraweb and Highwinds Media–two other major Usenet

26   operators whom Mr. Zada claims were able to remove infringing material without

27   the need for Message-IDs. I found that all 97 of those messages are still available

28   from both Astraweb and Highwinds Media.

Zada Exhibit 11(Notice 3):

60.   Exhibit 11/Notice 3 does not provide Giganews with information to locate all of the allegedly infringing material on its system without significant effort and ultimately uncertain results. Instead, all it states is that a search using the Mimo newsreader on an index that is not on Giganews's Usenet servers will turn up search results that reference messages that contain allegedly infringing material. Depending on the time and date of the search, the search results could reference messages that are not on Giganews's Usenet servers at that time. Therefore, Exhibit 11 does not explain how Giganews can locate the messages on Giganews's servers containing allegedly infringing material. In contrast, Pages 3 and 4 each depict a single Message-ID in the lower-right portion of the screenshot (the upper-right quadrant of the Exhibit page, as the Exhibit has the screenshot turned 90 degrees). Giganews used these Message-IDs to locate the messages containing allegedly infringing material. Giganews did not locate the messages by searching for "Alice Reynolds," nor could it have, as I explain in paragraph 69 below.

61.   The two messages the Message-IDs in Exhibit 11 identified were posted by two different accounts. It is impossible to determine whether the two Message-IDs are associated with two accounts that are responsible for all of the messages the search results in the screenshots on pages 3 and 4 reference without knowing the Message-IDs for every message the search results reference. The header information visible—the "From" header field of the messages—are not unique identifiers. A single account or multiple accounts could have used the same pseudonym.

62.   Giganews's Usenet servers do not provide a method for searching for messages based on keyword terms as described. The search results the screenshot depicts are provided by a Usenet newsreader and indexer, not Giganews's Usenet servers. The reproducibility of these search results depends on the specific index the newsreader used and the date and time at which the search was conducted.

18

63.   Other than the two Message-IDs, Exhibit 11/Notice 3 does not provide Giganews with information to locate all of allegedly infringing material allegedly on its system without significant effort and ultimately uncertain results. Instead, all it states is that a search using the Mimo newsreader on an index not on Giganews's Usenet servers will turn up search results that reference messages that contain allegedly infringing material. Depending on the time and date of the search, the search results could reference messages that are not on Giganews's Usenet servers at that time.   In order to locate on Giganews's servers all of the allegedly infringing material this communication refers to, Giganews would need to run a search that happened to return the exact same search results, download the message each search result references, decode the body of the message (if the message indeed includes an allegedly infringing image) compare the decoded image to Perfect 10's pages of thumbnail images, and then if it finds a match, retrieve the message header associated with that message and extract the Message-ID from the message header.

64.   As a result of the communication Exhibit 11 depicts, Giganews removed 2 messages by Message-ID. Checking Astraweb and Highwinds Media, Giganews finds that one of those messages is unavailable from both Astraweb and Highwinds Media, and the other is available from both.

Zada Exhibit 12 (Notice 4):

Exhibit 12/Notice 4 does not provide Giganews with information to locate all of the allegedly infringing material on its system. The notice does include 16 Message-IDs (appearing in the corner of the screenshots), and Giganews was able to remove those messages. However, as to the other messages for which Message-ID was absent, no unique identifiers were provided. The fields Perfect 10 provided–Poster, Subject etc., do not provide Giganews with information to locate the allegedly infringing material without extensive download, review and analysis.

65.   Perfect 10 described a search it had conducted using the Mimo newsreader on an index not on Giganews's Usenet servers. Depending on the time

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1   and date of the search, the search results could reference messages that are not on

2   Giganews's Usenet servers at that time. In order to locate on Giganews's servers

3   all of the allegedly infringing material this communication refers to, Giganews

4   would need to run a search that happened to return the exact same search results,

5   download the message each search result references, decode the body of the

6   message, if the message indeed includes an allegedly infringing image, compare the

7   decoded image to Perfect 10's pages of thumbnail images, and then if it finds a

8   match, retrieve the message header associated with that message and extract the

9   Message-ID from the message header.

10   *Zada Exhibit 13 (Notice 5):*

11   66.   Exhibit 13/Notice 5 does not provide Giganews with information to

12 locate all of the allegedly infringing material on its system. The notice does include

13 six Message-IDs (appearing in the corner of the screenshots), and Giganews was

14 able to remove those messages. As to the other messages for which Message-ID

15 was absent, the notice did not provide identifiers. The fields Perfect 10 provided–

16 Poster, Subject etc., do not provide Giganews with information to locate the

17 allegedly infringing material without extensive download, review and analysis.

18   67.   Perfect 10 described a search it had conducted using the Mimo

19 newsreader on an index not on Giganews's Usenet servers. Depending on the time

20 and date of the search, the search results could reference messages that are not on

21 Giganews's Usenet servers at that time. In order to locate on Giganews's servers

22 all of the allegedly infringing material this communication refers to, Giganews

23 would need to run a search that happened to return the exact same search results,

24 download the message each search result references, decode the body of the

25 message, if the message indeed includes an allegedly infringing image, compare the

26 decoded image to Perfect 10's pages of thumbnail images, and then if it finds a

27 match, retrieve the message header associated with that message and extract the

28 Message-ID from the message header.

1   68.   As a result of the communication Exhibit 13 depicts, Giganews

2 removed 6 messages by Message-ID. Checking Astraweb and Highwinds Media,

3 Giganews finds that all those messages are still available from both Astraweb and

4 Highwinds Media.

5   **INACCURACIES CONCERNING OTHER EXHIBITS**

6   *Zada Exhibit 2:*

7   69.   Perfect 10's Statement of Undisputed states that Zada Decl. ¶ 9, Exh.

8 2, p. 12 supports Perfect 10's claim that "Had Giganews wished to find the

9 Message-ID for any of the messages shown on pages 3-4 of the notice, it could

10 have performed a search on "Alice Reynolds" and then clicked on that message."

11 This is not true. Giganews's Usenet servers do not provide a method for searching

12 for messages based on keyword terms. The search results the Exhibit 2 screenshots

13 depict are provided by a Usenet newsreader and indexer, not Giganews's Usenet

14 servers. The reproducibility of these search results depends on the specific index

15 the newsreader used and the date and time at which the search was conducted.

16   *Zada Exhibits 4-7:*

17   70.   Perfect 10 claims that other Usenet operators "processed" notices from

18 Perfect 10 that did not include any Message-IDs. It is impossible to verify whether

19 particular messages at issue are available through a particular service provider

20 without a list of Message-IDs.

21   71.   The Zada Declaration claims that "astraweb.com found and blocked 37

22 'Message-IDs.'" All of the messages associated with the Message-IDs listed in

23 Exhibit 4 were available through Astraweb's Usenet servers as of November 14,

24 2013, although they appeared to be unavailable on November 22.

25   72.   Exhibits 5-7 do not provide any way to test Perfect 10's conclusions

26 about what other service providers have done.

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1   I declare under penalty of perjury that the foregoing is true and correct.

2   Executed on November 25, 2013.

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5   _____
                                                              Philip Molter

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MOLTER DECLARATION ISO
OPPOSITION TO MOTION FOR PARTIAL
SUMMARY JUDGMENT

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